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THE GOVERNMENT OF MALAYSIA & ANOR v. AMINAH AHMAD

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR CJ (SABAH & SARAWAK)
ABDUL RAHMAN SEBLI FCJ
B HASNAH MOHAMMED HASHIM FCJ
RHODZARIAH BUJANG FCJ
MOHAMAD ZABIDIN MOHD DIAH FCJ
[CIVIL APPEAL NO: 01(f)-26-06-2022(W)]
27 JUNE 2023

C

Abstract – *A 'less favourable' situation ought not to arise as a result of any adjustment or amendment made to any pension legislation, as that might contravene art. 147 of the Federal Constitution ('FC'), rendering both the amended and amending provisions null and void. The amendments to ss. 3 and 6 of the Pensions Adjustment Act 1980, as made by ss. 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 herein by substituting an adjustment based on a salary revision for Government employees with a standard 2% annual increment to the pension payable, offends art. 147 of the FC and the constitutional guarantee and protection provided therein. It is also not necessary that the pensioner must suffer actual loss or damage before the less favourable law may be held to contravene art. 147; it only requires that the 'later law' must not be 'less favourable'.*

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ADMINISTRATIVE LAW: *Public services – Gratuity and pension – Pension legislation – Adjustments – Validity – Whether amendments resulted in 'less favourable' situation for pensioners – Whether there was requirement that pensioner must first suffer actual loss or damage before less favourable law contravened art. 147 of Federal Constitution – Whether pre-amendment law ought to be revived – Pensions Adjustment Act 1980, ss. 3 & 6 – Pensions Adjustment (Amendment) Act 2013, ss. 3 & 7*

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The respondent was a pensioner who served the Government for more than 33 years and had retired from public service in September 2002. In 2013, the Pensions Adjustment Act 1980 ('PAA 1980') was amended by ss. 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 ('2013 Amendment Act') whereby ss. 3 and 6 of the PAA 1980 was deleted. The definition of 'corresponding last drawn salary' in s. 2 of the PAA 1980 was also deleted and were introduced two new sections, *ie*, ss. 3A and 3B. The said amendment came into effect on 1 January 2013. On 28 April 2017, the respondent, together with 56 other pensioners, filed a summons against the

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Government of Malaysia and the Director General of Public Service ('appellants'), praying for, *inter alia*, the following reliefs (i) a declaratory order that ss. 3 and 7 of the 2013 Amendment Act were *ultra vires* art. 147 of the Federal Constitution ('FC'); (ii) that the provisions of ss. 3 and 6 of the Pensions Adjustment Act 1980 prior to the amendments by ss. 3 and 7 of the 2013 Amendment Act be restored accordingly; and (iii) that the proper adjustments be made retrospectively to the pensions received by the recipients whose pensions had been calculated based on the post – 1 January 2013 formula and any shortfall resulting therefrom be paid to the respective recipients accordingly. The High Court dismissed the respondent's application. Aggrieved, the respondent appealed to the Court of Appeal. The Court of Appeal, in reversing the High Court decision, found that the amendments to ss. 3 and 6 of the PAA 1980, brought about by ss. 3 and 7 of the 2013 Amendment Act, resulted in a situation 'less favourable' to the respondent when compared with the preceding retirement adjustment scheme under the PAA 1980, prior to the amendments. Dissatisfied, the appellants sought leave to appeal, which was granted by this court, in respect of the following questions of law: (i) whether ss. 3 and 6 of the PAA 1980, as amended by ss. 3 and 7 of the 2013 Amendment Act, contravened art. 147 of the FC when a pensioner fails to prove that the adjusted pension received was actually financially less favourable when it was compared to the former law ('question 1'); (ii) whether s. 3 of the PAA 1980 as amended by s. 3 of the 2013 Amendment Act, which enables or empowers the Yang di-Pertuan Agong to prescribe an appropriate higher percentage of increment to be applied to an officer appointed before the coming into effect of the amendment should a situation that is less favourable arise was in itself in contravention of art. 147 of the FC ('question 2'); (iii)(a) without granting a declaration that the pre-amendment law is to be revived, whether the re-amendment law is revived by itself with the striking down of the impugned provision by the court ('question 3(a)') and (b) if the answer to the above was in the affirmative, whether a schedule to the pre-amendment law which had been deleted by Parliament with the coming into effect of the impugned provision, was likewise revived automatically ('question 3(b)').

Held (dismissing appeal)

Per Mohamad Zabidin Mohd Diah FCJ delivering the judgment of the court:

(1) In determining the constitutionality of a statutory provision, it is sufficient to show the possibility of it being applied for the purposes not sanctioned by the Constitution. In short, actual and potential harm are included within the scope of a constitutional challenge. The mere fact the word used is 'may' resulted in what would have been an adjustment that would have occurred as of right under the old scheme, reduced to something that may or may not be acted upon in the manner provided

by the amendments. As to whether the 2013 Amendment Act could be said to be a less favourable pension adjustment, it was not in dispute that the amended s. 3(2) of the PAA 1980 acknowledged that a less favourable situation could arise. After a careful reading of the amended sections, with the word 'may' being used as the mechanism built into s. 3(2) to address a less favourable situation, should it arise, was merely permissive. The amended s. 3(2) of the PAA 1980 did not ensure that art. 147 of the FC was not contravened. (paras 40-43)

(2) Under art. 147 of the FC, there is no requirement that any pensioner must first suffer actual loss or damage before the less favourable law may be held to contravene art. 147. It only requires that the 'later law' must not be 'less favourable'. The existence of a risk that a less favourable situation might arise and the mere possibility that it can arise, which is an acknowledgment inherent in s. 3(2) as amended, sufficed in establishing that a less favourable situation had indeed, already come about. It was irrelevant whether there was actual implementation of the amendment that put the pensioner at a disadvantage. The amendments to ss. 3 and 6 of the PAA 1980 brought about by ss. 3 and 7 of the 2013 Amendment Act had resulted in a less favourable situation to the respondents and thus contravened art. 147 of the FC. Therefore, the answer to question 1 was in the affirmative and there was no necessity to answer question 2. (paras 45 & 46)

(3) When a court strikes down a statute or an amendment to a statute, the pre-existing provision is automatically revived. Hence, the answers to questions 3(a) and 3(b) were answered in the affirmative. (paras 48 & 49)

Bahasa Melayu *Headnotes*

Responden adalah pesara yang berkhidmat dengan Kerajaan selama lebih 33 tahun dan telah bersara daripada perkhidmatan awam pada bulan September 2002. Pada 2013, Akta Penyelarasan Pencen 1980 ('APP 1980') iaitu, dipinda oleh ss. 3 dan 7 Akta Penyelarasan Pencen (Pindaan) 2013 ('Akta Pindaan 2013') iaitu, ss. 3 dan 6 APP 1980 telah dipadamkan. Definisi 'gaji terakhir yang sesuai' dalam s. 2 APP 1980 juga dihapuskan dan dua seksyen baharu dimasukkan, iaitu ss. 3A dan 3B. Pindaan tersebut berkuatkuasa pada 1 Januari 2013. Pada 28 April 2017, responden, bersama-sama dengan 56 pesara lain, mengemukakan saman terhadap Kerajaan Malaysia dan Ketua Pengarah Perkhidmatan Awam ('perayu') menuntut, antara lain, relief-relief berikut: (i) perintah perisytiharan bahawa ss. 3 dan 7 Akta Pindaan 2013 adalah *ultra vires* per. 147 Perlembagaan Persekutuan ('PP'); (ii) peruntukan ss. 3 dan 6 APP sebelum pindaan oleh ss. 3 dan 7 Akta Pindaan 2013 dipulihkan dengan sewajarnya; dan (iii) pelarasan yang betul dibuat secara retrospektif terhadap pencen yang diterima oleh penerima yang pencennya telah dikira berdasarkan formula pasca 1 Januari 2013 dan

apa-apa kekurangan yang timbul daripadanya dibayar kepada penerima masing-masing dengan sewajarnya. Mahkamah Tinggi menolak permohonan responden. Terkilan, responden mengemukakan rayuan ke Mahkamah Rayuan. Mahkamah Rayuan, apabila mengakas keputusan Mahkamah Tinggi, mendapati bahawa pindaan terhadap ss. 3 dan 6 APP 1980, yang dibuat oleh ss. 3 dan 7 Akta Pindaan 2013, mengakibatkan situasi 'kurang memanfaatkan' pada responden jika dibandingkan dengan skema pelarasan persaraan sebelumnya bawah APP 1980, sebelum pindaan. Tidak berpuas hati, perayu-perayu menuntut kebenaran merayu dan mahkamah ini membenarkannya berhubungan persoalan undang-undang berikut: (i) sama ada ss. 3 dan 6 APP 1980, sebagaimana yang dipinda oleh ss. 3 dan 7 Akta Pindaan 2013, melanggar per. 147 PP apabila seorang pesara gagal membuktikan bahawa pelarasan pencen yang diterima sebenarnya kurang memanfaatkan dari segi kewangan apabila dibandingkan dengan undang-undang terdahulu ('soalan 1'); (ii) sama ada s. 3 APP 1980 seperti yang dipinda oleh s. 3 Akta Pindaan 2013 yang membolehkan atau memberi kuasa pada Yang di-Pertuan Agong untuk menetapkan peratusan kenaikan yang lebih tinggi yang sesuai untuk digunakan kepada pegawai yang dilantik sebelum penguatkuasaan pindaan sekiranya situasi yang kurang disenangi timbul dengan sendirinya bertentangan dengan per. 147 PP ('soalan 2'); (iii)(a) tanpa perisytiharan bahawa undang-undang pra-pindaan akan dihidupkan semula, sama ada undang-undang pindaan semula dihidupkan kembali dengan sendirinya dengan penghapusan peruntukan yang disangkal oleh mahkamah ('soalan 3(a); dan (b) jika jawapan untuk yang di atas adalah afirmatif, sama ada jadual undang-undang pra-pindaan yang telah dipadamkan oleh Parlimen dengan penguatkuasaan peruntukan yang disangkal, juga dihidupkan semula secara automatik ('soalan 3(b)').

Diputuskan (menolak rayuan)
Oleh Mohamad Zabidin Mohd Diah HMP menyampaikan penghakiman mahkamah:

(1) Apabila menentukan keperlembagaan peruntukan undang-undang, adalah cukup untuk menunjukkan kemungkinan itu diguna pakai untuk tujuan yang tidak dibenarkan oleh Perlembagaan. Pendek kata, bahaya sebenar dan berpotensi termasuk dalam ruang lingkup cabaran perlembagaan. Fakta semata-mata kata yang digunakan adalah 'may' menjurus pada pelarasan yang dibuat mengikut hak bawah skema lama, dikurangkan menjadi sesuatu yang mungkin atau mungkin tidak boleh dikuatkuasakan dalam cara yang diperuntukkan oleh pindaan. Sama ada Akta Pindaan 2013 boleh dikatakan sebagai pelarasan pencen yang kurang menggalakkan, adalah tidak dipertikaikan bahawa pindaan s. 3(2) APP 1980 mengakui bahawa keadaan kurang disenangi boleh timbul. Selepas membaca dengan teliti bahagian yang dipinda, dengan perkataan

A 'boleh' digunakan sebagai mekanisme yang dibina dalam s. 3(2) untuk menangani situasi yang kurang baik, sekiranya itu timbul, adalah hanya permisif. Pindaan s. 3(2) APP 1980 tidak memastikan bahawa per. 147 PP tidak dilanggar.

B **(2)** Bawah per. 147 PP, tidak ada syarat bahawa mana-mana pesara mesti terlebih dahulu mengalami kerugian atau kerosakan yang sebenarnya sebelum undang-undang yang kurang memanfaatkan dapat dianggap bertentangan dengan per. 147. Itu hanya memerlukan 'undang-undang kemudian' tidak boleh 'kurang memanfaatkan'. Kewujudan risiko yang mungkin menimbulkan situasi yang kurang memanfaatkan dan
C kemungkinan itu akan timbul, satu yang diakui wujug dalam s. 3(2) seperti yang dipinda, mencukupi untuk membuktikan bahawa situasi yang kurang memanfaatkan, memang sudah berlaku. Tidak relevan sama ada terdapat pelaksanaan pindaan yang sebenarnya yang menjadikan pesara berada dalam keadaan yang tidak memanfaatkan. Pindaan ss. 3
D dan 6 APP 1980 yang dibawa oleh ss. 3 dan 7 Akta Pindaan 2013 mengakibatkan keadaan yang kurang untuk responden dan dengan itu bertentangan dengan per. 147 PP. Oleh itu, soalan 1 adalah dijawab secara afirmatif dan tidak ada keperluan untuk menjawab soalan 2.

E **(3)** Apabila mahkamah membatalkan statut atau pindaan pada statut, peruntukan sedia ada dihidupkan semula secara automatik. Oleh itu, soalan 3(a) dan 3(b) dijawab secara afirmatif.

Case(s) referred to:

Cullen v. Chief Constable of the Royal Ulster Constabulary [2003] 1 WLR 1763 ***(refd)***

Hj Wan Othman & Ors v. Government of the Federation of Malaya [1965] 1 LNS 51 HC ***(refd)***
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Mohamed v. The State [1999] 2 AC 111 ***(refd)***

NR Sundararaj v. Ketua Pengarah Jabatan Perkhidmatan Awam, Malaysia & Anor [1993] 1 LNS 145 HC ***(refd)***

Record v. Union of India (2016) 5 SCC 1 ***(refd)***

G **Legislation referred to:**

Federal Constitution, art. 147(1)

Interpretation Acts 1948 And 1967, s. 73

Pensions Adjustment (Amendment) Act 2013, ss. 3(1), (2), 7

Pensions Adjustment Act 1980, ss. 2, 3(2), 3A, 3B, 6

H *For the appellants - Shamsul Bolhassan, Liew Horng Bin & Kogilambigai Muthusamy; AG's Chambers*

For the respondent - Gopal Sri Ram, Lim Choon Khim, Chin Yan Leng, How Li Nee & Athanasia Bortolome; M/s CK Lim Law Chambers

I *[Editor's note: For the Court of Appeal judgment, please see Aminah Ahmad v. The Government Of Malaysia & Anor [2022] 2 CLJ 726 (overruled); For the High Court judgment, please see [2020] 3 CLJ 75 (affirmed).]*

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamad Zabidin Mohd Diah FCJ:

Introduction

[1] The Government of Malaysia and the Director General of Public Service who are the appellants, are appealing against the decision of the Court of Appeal which reversed the decision of the High Court delivered on 8 January 2020. The High Court had, on the said date, dismissed the respondent's Originating Summon challenging the validity of certain amendments made to the Pensions Adjustment Act 1980 ("PAA 1980").

Background Facts

[2] The respondent, Aminah binti Ahmad, is a pensioner who served the government for more than 33 years. She retired from public service in September 2002.

[3] In 2013, the Pensions Adjustment Act 1980 (PAA 1980) was amended by s. 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 ("2013 Amendment Act") whereby ss. 3 and 6 of the PAA 1980 was deleted.

[4] The definition of "corresponding last drawn salary" in s. 2 of the PAA 1980 was also deleted and introduced two new sections, that are, ss. 3A and 3B to the PAA 1980.

[5] The said amendment came into effect on 1 January 2013.

[6] On 28 April 2017, the respondent together with 56 other pensioners filed a summons against the appellants, *inter alia*, praying for the following reliefs:

(i) a declaratory order that ss. 3 and 7 of the 2013 Amendment Act are *ultra vires* art. 147 of the Federal Constitution;

(ii) a declaratory order that ss. 3 and 6 of the Pensions Adjustment Act 1980 as amended by ss. 3 and 7 of the 2013 Amendment Act which came into force since 1 January 2013 are *ultra vires* art. 147 of the Federal Constitution;

(iii) that the provisions of s. 3 and 6 of the Pensions Adjustment Act 1980 prior to the amendments by ss. 3 and 7 of the 2013 Amendment Act be restored accordingly; and

(iv) that the proper adjustments be made retrospectively to the pensions received by the recipients whose pensions had been calculated based on the post 1 January 2013 formula and any shortfall resulting therefrom be paid to the respective recipients accordingly.

A **Proceedings In The High Court**

[7] On 9 January 2020, the High Court dismissed the respondent's application with no order as to costs. In deciding so, the High Court made, *inter alia*, the following observations and findings:

B (a) Subsection 3(1) as amended by the 2013 Amendment Act changed the criteria by which pension is adjusted under the PAA 1980. It changed the statutory mechanism for the adjustment of pension from one that is based on the latest revision of an applicable salary scale to an adjustment mechanism that is based on a fixed rate of increment of 2% pa.

C (b) The amended sub-ss. 3(1), 3(2) and 3(3) in its entirety together with the new sub-ss. 3A(1), 3A(2)(a), 3A(2)(b), and 3A(3) that Parliament was aware that the amendment from the variable rate of pension adjustment pegged to the latest revision of the applicable salary scale to a fixed rate adjustment of 2%pa could result in certain pensioners or their widows, children, dependants or personal representatives being put in a position
D that is less favourable from their position prior to the amendments in the PAA 1980 coming into effect.

(c) Therefore, in order to ensure that the constitutional guarantee enshrined in art. 147 of the Federal Constitution is preserved and to protect against the likelihood of situations where pensioners or their widows, children, dependants or personal representatives are put in a less
E favourable position because of the change to the annual fixed rate pension adjustment, Parliament expressly provided a safeguard in sub-s. 3(2) of the PAA 1980.

(d) sections 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 are not *ultra vires* art. 147 of the Federal Constitution. Section 3 of the
F Pensions Adjustment Act 1980 as amended by s. 3 the Pensions Adjustment (Amendment) Act 2013 is also not *ultra vires* art 147 of the Federal Constitution.

Proceedings In The Court Of Appeal

G **[8]** Aggrieved by the High Court's decision, the respondent appealed to Court of Appeal. On 13 January 2022, the Court of Appeal, reversed the High Court decision. The Court of Appeal found the amendments to ss. 3 and 6 of the PAA 1980, brought about by ss. 3 and 7 of the 2013 Amendment Act, resulted in a situation "less favourable" to the respondent when compared with the preceding retirement adjustment scheme under the PAA
H 1980, prior to the amendments. Hence, the following orders were made by the Appeal Court:

(i) a declaration that ss. 3 and 7 of the 2013 Amendment Act are null and void being in contravention of art. 147 of the Federal Constitution;

I (ii) a declaration that ss. 3 and 6 of the Pensions Adjustment Act 1980 as amended by ss. 3 and 7 of the 2013 Amendment Act and in force since 1 January 2013 are null and void being in contravention of art. 147 of the Federal Constitution; and

(iii) the declarations made are only to take effect prospectively from the date of this decision, *ie*, 13 January 2022.

Questions Of Law

[9] Aggrieved by the above decision, the appellants seek leave to appeal and this court granted the appellant leave to appeal in respect to the following questions of law:

> (i) Whether ss. 3 and 6 of the Pensions Adjustment Act 1980 as amended by ss. 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 contravene art. 147 of the Federal Constitution when a pensioner fails to prove that the adjusted pension received is actually financially less favourable when it is compared to the former law;
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> (ii) Whether s. 3 of the Pensions Adjustment Act 1980 as amended by s. 3 of the Pensions Adjustment (Amendment) Act 2013 which enables or empowers the Yang di-Pertuan Agong to prescribe an appropriate higher percentage of increment to be applied to an officer appointed before the coming into effect of the amendment should a situation of less favourable arise is in itself in contravention of art. 147 of the Federal Constitution.
>
> (iii) (a) Without granting a declaration that the pre-amendment law is to be revived, whether the pre-amendment law is revived by itself with the striking down of the impugned provision by the court.
>
> (b) If the answer to the above is in the affirmative, whether a schedule to the pre-amendment law which has been deleted by Parliament with the coming into effect of the impugned provision, is likewise revived automatically.

[10] We heard the appeal on 16 December 2022, at the end of which we CAV (*curia advisari vult*) for decision. Now, we provide our decision.

Appeal

[11] As alluded to earlier, this appeal concerns the validity of amendments made to the PAA 1980. The challenge to the validity of the amendments in question was premised upon art. 147 of the Federal Constitution.

[12] In essence, it is the appellants' contention that the Court of Appeal (COA) erred in declaring ss. 3 and 7 of the 2013 Amendment Act are null and void as they contravene art. 147 of the Federal Constitution.

[13] According to the learned Senior Federal Counsel, the amendments to ss. 3 and 6 of the PAA 1980, brought about by ss. 3 and 7 of the 2013 Amendment Act, did not result in a situation which is "less favourable" to the respondent when compared with the preceding retirement adjustment scheme under the PAA 1980.

[14] The learned Senior Federal Counsel submitted that there are three reasons for saying so:

(i) pensions adjustment provided under Act 238 is not a right protected under art. 147(1) Federal Constitution;

(ii) the COA had applied wrongly the "not less favourable" test in art. 147(1) of the Federal Constitution; and

(iii) Act 238 and Act A1447 served a legitimate purpose and are proportionate responses to a justifiable exception.

[15] It was contended by the appellants that public service pension scheme as provided under the Pensions Act 1980 (Act 227) is not a form of "deferred remuneration". There is zero contribution from the public service employees and their salary is not deducted for retirement investment or in return for derivative benefit. The pension is an *ex gratia* payment and not a right. The learned Senior Federal Counsel referred us to the case of *Hj Wan Othman & Ors v. Government of the Federation of Malaya* [1965] 1 LNS 51; [1965] 2 MLJ 31 to support his contention. Also cited was the decision in *NR Sundararaj v. Ketua Pengarah Jabatan Perkhidmatan Awam, Malaysia & Anor* [1993] 1 LNS 145; [1993] 1 MLJU 278, where Abu Mansor J stated as follows:

> A case directly on point is the cited case of *Haji Wan Othman & Ors v. Government of the Federation of Malaya* [1965] 2 MLJ 31, where it was held that the whole tenor of the pensions legislation is permissive and no officer has therefore an absolute right to pension.

[16] It was further submitted on behalf of the appellants that, the 2013 Amendment Act does not give rise to a less favourable situation when compared with the preceding retirement adjustment scheme under the PAA 1980, prior to the amendments. To the contrary, it was introduced for the benefit of the retirees. Although appellants conceded that the pre-amended PAA 1980 had provided for adjustments to pensions, however, it was contended that the 2013 Amendment Act brought about adjustments "for the benefit and welfare of pensioners and their dependents without having to wait for any salary revision in the civil service". Hence, the Amendment Act which gives an increment of two percent annually. To support this proposition, learned Senior Federal Counsel cited the explanation given by the Timbalan Menteri at Jabatan Perdana Menteri, Datuk Liew Vui Keong, in Parliament on 27 November 2012, as recorded in the *Hansard*, relevant excerpts of which are reproduced below:

> Timbalan Menteri di Jabatan Perdana Menteri [Datuk Liew Vui Keong]:
>
> Tuan Yang di-Pertua, saya memohon mencadangkan supaya rang undang-undang bernama Akta Penyelerasan Pencen (Pindaan) 2012 dibaca kali yang kedua sekarang.

Tuan Yang di-Pertua, Akta Penyelerasan Pencen 1980 [Akta 238] ialah undang-undang yang mentadbir urusan penyelerasan pencen dan faedah persaraan lain bagi pesara Perkhidmatan Awam Persekutuan dan negeri serta pesara pihak berkuasa berkanun dan tempatan apabila berlakunya semakan gaji anggota sector awam.

Tuan Yang di-Pertua, tujuan pindaan yang dicadangkan adalah bagi menggantikan cara penyelerasan pencen sedia ada dengan satu kaedah baru yang lebih baik mengambil kira perubahan-perubahan terkini dalam prinsip dan struktur gaji sector awam di samping menjaga kebajikan penerima pencen.

Tuan Yang di-Pertua, sudah tiba masanya system penyelarasan pencen yang telah pun memberikan kebaikan kepada pesara setelah sekian lama dipinda sesuai dengan perkembangan tersebut. Untuk menangani perubahan-perubahan yang berlaku ini, kita perlu menetapkan satu kadar bagi penyelerasan pencen yang tidak lagi bergantung pada semakan gaji berasaskan gaji bersamaan yang akhir diterima. Cara yang dicadangkan adalah kenaikan pencen sebanyak 2 peratus setiap tahun untuk semua anggota penerima pencen yang berkuatkuasa mulai 1 Januari 2013.

Cara penyelarasan yang dicadangkan ini akan memberikan manfaat kepada semua pesara yang bukan sahaja di kalangan pesara perkhidmatan awam persekutuan malahan termasuk juga pesara perkhidmatan awam negeri serta perkhidmatan berkuasa berkanun dan tempatan di negeri-negeri. Pencen bagi semua golongan ini dibiayai sepenuhnya oleh Kerajaan Persekutuan.

Tuan Yang di-Pertua, antara keluhan pesara dan penerima pencen pada masa ini ialah mereka terpaksa menunggu semakan gaji anggota sektor awam untuk mendapat kenaikan pencen. Semakan gaji ini biasanya dibuat dalam tempoh lima tahun. Sebaliknya, cara penyelarasan yang dicadangkan ini membolehkan pesara menikmati kenaikan pencen setiap tahun. Contohnya seseorang pesara yang menerima pencen RM1,000 pada penghujung 2012, pada 1 Januari 2013 pencennya akan meningkat kepada RM1,020. Pada 1 Januari 2014 pencennya akan meningkat kepada RM1,040.40 dan pada 1 Januari 2015 pencennya akan meningkat kepada RM1,061.20. Penyelarasan pencen setiap tahun ini untuk seumur hidup diharap dapat membantu pesara menampung kos sara hidup yang semakin meningkat dari semasa ke semasa yang disebabkan oleh inflasi.

Tuan Yang di-Pertua, adalah diakui pada masa kini pesara tidak boleh membuat perancangan kewangan mereka kerana tidak mengetahui bila dan berapa kadar kenaikan pencen mereka. Dengan pindaan yang dicadangkan ini kadar kenaikan pencen tahunan dimaktubkan dalam Undang-undang Penyelarasan Pencen. Pelaksanaan cadangan ini akan menceriakan semua pesara sektor awam.

Tuan Yang di-Pertua, ini adalah satu hadiah daripada kerajaan yang prihatin serta mengenang bagi menghargai jasa-jasa pesara yang telah memberikan sumbangan bakti kepada negara semasa mereka berkhidmat dahulu. Bagi pegawai yang sedang berkhidmat pula, anggaplah

penambahbaikan ini sebagai satu dorongan untuk terus berkhidmat secara produktif dan menyampaikan perkhidmatan dengan lebih cemerlang demi kesejahteraan rakyat. Tuan Yang di-Pertua, saya mohon mencadangkan.

[17] According to the learned Senior Federal Counsel, the annual two percent increment brought about by the 2013 Amendment Act cannot be said to be a less favourable pensions adjustment. In addition, it was pointed out that the amended s. 3(2) addresses a less favourable outcome, should it arise. Should the annual two percent increment result in a situation less favourable to an officer, an application may be made and the Yang di-Pertuan Agong may prescribe different percentages of increment for different categories of recipients to remedy the situation.

[18] The respondent on the other hand contended otherwise. The respondent contended that the amendments introduced through ss. 3 and 7 of the 2013 Amendment Act had converted a constitutional right under art. 147 into a mere discretionary benefit at the munificence of the Executive. Thus, the amendments had resulted in a situation 'less favourable' to her and the fifty-six pensioners she represents, when compared with their position under the PAA 1980, prior to the 2013 Amendment Act.

[19] She affirmed an affidavit stating that the PAA 1980, before its amendment, had introduced a new two-pronged principle that pensions be adjusted on current salaries and intricately linked to their respective grade and rank in the civil service. This gave the pensioners an assurance of enjoying a continuous pension of comparable amounts to those retired subsequently on similar grades and rank.

Our Analysis And Decision

[20] Questions 1 and 2 of leave questions will be taken together and we start by reproducing art. 147 of Federal Constitution.

Article 147 of the Federal Constitution

Protection of pension rights

147

(1) The law applicable to any pension gratuity or other like allowance (in this article referred to as an "award") granted to a member of any of the public services, or to his widow, children, dependant or personal representatives, shall be that in force on the relevant day or any later law not less favourable to the person to whom the award is made.

(2) For the purposes of this Article the relevant day is:

(a) in relation to an award made before Merdeka Day, the date on which the award was made;

(b) in relation to an award made after Merdeka Day to or in respect of any person who was a member of any of the public services before Merdeka Day, the thirtieth day of August, nineteen hundred and fifty-seven;

(c) in relation to an award made to or in respect of any person who first became a member of any of the public services on or after Merdeka Day, the date on which he first became such a member.

(3) For the purposes of this Article, where the law applicable to an award depends on the option of the person to whom it is made, the law for which he opts shall be taken to be more favourable to him than any other law for which he might have opted.

[21] It is clear that art. 147 provides for the protection of pension rights, and as a specifically provided right under the Federal Constitution, it must be regarded as a protected and value-added right. It is significant to bear in mind that, the protection afforded to pensioners from the public services against any subsequent and less favourable law is embodied in the Federal Constitution. That protection must therefore be accorded the importance and gravity equal to the Federal Constitution itself. The same position was taken by the House of Lords in *Cullen v. Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763 CA, although not binding, we find it to be quite persuasive, where the House of Lords quoted with approval the advice of Privy Counsel in *Mohamed v. The State* [1999] 2 AC 111 and held:

... Their Lordships are satisfied that in *King v. The Queen*, which was decided in 1968, the Board took too narrow a view on this point. It is a matter of fundamental importance that a right has been considered important enough by the people of Trinidad and Tobago, through their representatives, to be enshrined in their Constitution. The Stamp of constitutionality on a citizen's right is not meaningless: it is clear testimony that an added value is attached to the protection of the right.

[22] The main issue here is whether the amendments brought about by the 2013 Amendment Act resulted in a situation "less favourable" to the respondent when compared with the preceding retirement adjustment scheme under the PAA 1980, prior to the amendments and thus contravenes art. 147(1) of the Federal Constitution. For easy reference we reproduce below the relevant sections of the PAA 1980 pre-amendment and post-amendment.

PAA 1980 Prior To The 2013 Amendment Act

[23] Prior to the 2013 Amendment Act, s. 3 of the PAA 1980 provided as follows:

Adjustment of pensions and other benefits of officers and dependants

3. (1) Pensions and other benefits granted to officers and their dependants under any written law before or on the implementation of any current salary scale shall be adjusted in accordance with the provisions of this Act

A and shall be paid or be payable with effect from the date of implementation of the current salary scale; and (2) The pension or retiring allowance of an officer shall be adjusted as provided in the First Schedule.

[24] Section 2 of the PAA 1980, provided that:

B "current salary scale" means the latest scale which is, on or after the coming into force of this Act, applicable to officers of the public service and employees of statutory and local authorities to whom the revision of salaries made by the Federal Government with effect from 1 January 1976, or any other subsequent revision thereof made by the Federal Government from time to time, is applicable.

C **[25]** The relevant portion of the First Schedule referred to in s. 3(2) provided as follows:

First Schedule
[Section 3]
Adjustment Formula For Service Pension And
D Retiring Allowance

Type of Benefit	Formula
1. (a) Service pension to a pensionable officer	1/600 x number of months of reckonable service (subject to not more than 360 months) x corresponding last drawn salary

E

[26] Section 2 of the PAA 1980, provided that:

Corresponding last drawn salary means the corresponding last drawn
F salary as defined under subs. 6(2).

[27] Prior to the 2013 Amendment Act, s. 6 of the PAA 1980 provided as follows:

Determination of corresponding last drawn salary

G 6. (1) The Director General shall determine the corresponding last drawn salary of an officer.

(2) For the purposes of this Act, "corresponding last drawn salary" means, in the case of an officer to whom the current salary scale does not apply by virtue of:

H (a) his not having had an opportunity to opt;

(b) his not having opted; or

(c) his not being deemed to have opted,

for the current salary scale, the equivalent salary that the officer would
I have drawn under the current salary scale prior to death in service or to retirement had he been in service on the implementation of the current salary scale and had it been applied to him.

[28] It is pertinent to note here that prior to the 2013 Amendment Act, pensions under the PAA 1980 were adjusted whenever there was a revision or adjustment of salary for serving government employees in the public services.

The Impugned Amendments

[29] Section 3 of the PAA 1980 was amended by s. 3 of the 2013 Amendment Act. Section 7 of the 2013 Amendment Act amended s. 6 of the PAA 1980 by deleting s. 6 altogether. These amendments came into effect on 1 January 2013.

[30] Section 3 of the PAA 1980 was substituted with the following:

3.

(1) Pensions and other benefits granted to officers and their dependants under any written law shall be adjusted annually by an increment of two percent in accordance with the provisions of this Act and shall be paid or be payable with effect from January of each year.

(2) Notwithstanding subsection (1), where the application of the specified rate of increment would result in a situation that is less favourable to an officer appointed before the coming into force of this section, the Yang di-Pertuan Agong may by order in the Gazette prescribe an appropriate higher percentage of increment to be applied in such case.

(3) For the purpose of an order under subsection (2), the Yang di-Pertuan Agong may prescribe:

(a) different percentages of increment for different categories of recipients:

(b) that the higher percentage of increment shall only apply for a specified year or any part thereof, and in such case, the date on which the adjustment shall be payable.

[31] New ss. 3A and 3B were introduced and they read as follows:

3A. (1) Pensions, disability pensions, retiring allowances or injury allowances received by an officer under any written law shall be adjusted in accordance with subsection 3(1).

(2) The amount of pension, disability pension, retiring allowance or injury allowance to be used as the basis for the first of the adjustments under subsection 3(1):

(a) in the case of an officer who retired before or on 1 January 2012, shall be the amount of pension, disability pension, retiring allowance or injury allowance which had been adjusted on that date;

A (b) in the case of an officer who retired on or after 2 January 2012, shall be the amount of pension, disability pension, retiring allowance or injury allowance which had been granted to the officer.

(3) The adjustment referred to in subsection (1) is subject to any higher percentage of increment which may be made under subsection 3(2).

B Adjustment of lowest pension and other benefits

3B. Where an officer is receiving the lowest amount of pension or other benefit payable pursuant to section 8, the said lowest amount shall be used as the basis for the first of the adjustments under subsection 3(1).

C **[32]** The amendments introduced also deleted the definition of the term "corresponding last drawn salary" under s. 2 of the PAA 1980. Prior to the 2013 amendments, (hereinafter referred to as "old scheme"), ss. 3 and 6 of the PAA 1980 were read together with First Schedule of the Act which provides that the amount of pension payable to pensioner is 50% of his or her last drawn salary.

D **[33]** Under the old scheme, the amount of pensions receivable by a pensioner would correspondingly increase whenever there is a salary revision for public officer, provided the pensioner and public officer are of the same grade.

E **[34]** With the amendments, s. 3(1) introduced a new method of adjusting pensions and other benefits by means of an annual increment of two percent payable from January of each year.

[35] The new s. 3(2) provides a mechanism for an adjustment should the annual rate of increment result in a situation less favourable to pensioner F compared to old scheme. If such a situation arises the Yang di-Pertuan Agong may by order in the *Gazette* prescribe an appropriate higher percentage of increment to be applied in such case.

[36] Under the new scheme, any salary revision in the prevailing salary scheme applicable to public officers in service would be of no consequence G to the pensioners, even though they may be of the same grade.

Was Article 147 Of The Federal Constitution Contravened?

[37] In essence, the appellants' case is that (i) the pension is not an entitlement but an *ex gratia* payment; (ii) the 2013 Amendment Act was H introduced for the benefit of the retirees; and (iii) the respondent did not suffer actual loss. Thus, art. 147 is not contravened.

[38] Although the appellants conceded that the pre-amended PAA 1980 had provided for adjustments to pensions, it was contended that the 2013 Amendment Act brought about adjustments "for the benefit and welfare of I

pensioners and their dependents without having to wait for any salary revision in the civil service. Therefore, the annual two percent increment brought about by the 2013 Amendment Act cannot be said to be a less favourable pension adjustment. In addition, it was pointed out that the amended s. 3(2) addresses a less favourable outcome, should it arise. Should the annual two percent increment result in a situation less favourable to an officer, an application may be made and the Yang di-Pertuan Agong may prescribe different percentages of increment for different categories of recipients to remedy the situation. Finally, it was argued that the respondent did not prove that she had suffered actual loss as the result of the amendments and hence, the amendments could not be said to be less favourable to her.

[39] After going through the submissions by both parties, with respect, we are not persuaded by the appellants' submission. On the issue of entitlement to the pensions by public servant, we with respect, agree with the COA which, speaking through the judgment of Justice Darryl Goon Soon Chye, had made the following observation:

> However, we are not here concerned with a claim to an entitlement to pension not granted. The issue at hand is a narrow one. It is whether the amendments to sections 3 and 6 of the PAA 1980 contravenes art. 147 of the Federal Constitution. It is whether the law applicable to pensions granted to members of the public services has somehow been rendered less favourable.

[40] As to whether the 2013 Amendment Act could be said to be a less favourable pension adjustment, it is not in dispute that the amended s. 3(2) of the PAA 1980 acknowledges that a less favourable situation could arise. As correctly observed by the High Court at paras. [30] and [32] of the learned judge's judgment and quoted with approval by the COA, it was stated:

> [30] It is clear to me on reading the amended subsections 3(1), 3(2) and 3(3) in its entirety together with the new subsections 3A(1), 3A(2)(a), 3A(2)(b) and 3A(3) that Parliament was aware that the amendment from the variable rate of pension adjustment pegged to the latest revision of the applicable salary scale to a fixed rate adjusted of two (2%) per cent per annum could result in certain pensioners or their widows, children, dependents or personal representatives being put in a position that is less favourable from their position prior to the amendments in the PAA 1980 coming into effect.
>
> [32] Therefore in order to ensure that the constitutional guarantee enshrined in art. 147 of the Federal Constitution is preserved and to protect against the likelihood of situations where pensioners or their widow, children, dependants or personal representatives are put in a less favourable position because of the change to the annual fixed rate pension adjustment, Parliament expressly provided a safeguard in subsection 3(2) of the PAA 1980.

[41] Now the issue before us as well as before the courts below is, does the amended s. 3(2) of the PAA 1980 ensure that the constitutional guarantee in art. 147 of the Federal Constitution is preserved? The COA did not think so. The COA expressed its reasons as follows:

> [28] The amended s. 3(2) of the PAA 1980, as was quite rightly pointed out, caters for a situation where the annual two per cent increment may result in a situation less favourable than under the PAA 1980, prior to its amendment.
>
> [29] In our view, the amended s. 3(2) of the PAA 1980 is in fact an acknowledgement that the amendments could result in a less favourable situation. On this, we agree with the learned Judge. However, the mechanism built into s. 3(2) to address a less favourable situation, should it arise, is merely permissive. This is because what is clearly stated is that should a less favourable situation materialise, the Yang di-Pertuan Agong "... may by order in the Gazette prescribe an appropriate higher percentage of increment to be applied in such case"
>
> [30] It is plainly obvious that the term "may", in s. 3(2) of the PAA 1980 as amended, imposes no obligation to act. "May" is merely permissive (see *Datuk Raja Ahmad Zainuddin bin Raja Omar v. Perbadanan Kemajuan Iktisad Negeri Kelantan* [2016] 6 MLJevi 66 at para 14). In context, it simply cannot be read as "shall" and there is also no submission by the respondents to this effect. It is evident that the word "may" is here used in contradistinction to the word "shall". This is not a case that admits of more than one possible interpretation. Thus, what would have been an adjustment that would have occurred as of right under the PAA 1980 before its amendment, is, by reason of the 2013 Amendment Act, reduced to something that may be acted upon in the manner provided by the amendments.
>
> [31] In our view, the amended s. 3(2) of the PAA 1980 does not ensure that art. 147 of the Federal Constitution is not contravened. It would have been so if, should a less favourable situation arise, the machinery provided for adjustment under the amended s. 3(2) were to be implemented automatically or that it shall be so implemented as of right, to extinguish the less favourable situation.

[42] After careful reading of the amended sections, we with respect, are in agreement with the COA that with the word "may", being used as the mechanism built into s. 3(2) to address a less favourable situation, should it arise, is merely permissive. The amended s. 3(2) of the PAA 1980 does not ensure that art. 147 of the Federal Constitution is not contravened.

[43] It is trite law that in determining the constitutionality of a statutory provision, it is sufficient to show the possibility of it being applied for the purposes not sanctioned by the Constitution. In short, actual and potential

harm are included within the scope of a constitutional challenge. The mere fact the word used is "may" resulted in what would have been an adjustment that would have occurred as of right under the old scheme, reduced to something that may or may not be acted upon in the manner provided by the amendments.

[44] The next question is, must the respondent or the pensioners she represents suffer actual loss or damage before it may be contended that a "less favourable" occurred and thus, art. 147 of the Federal Constitution is contravened? As alluded to earlier in this judgement, calculations were presented by the respondent in her affidavit to demonstrate how a less favourable outcome had occurred. The calculations provided by the respondent were found to be incorrect by the learned High Court Judge. Be that as it may, we are of the considered view that there need not be actual loss or damages suffered by the respondents before a less favourable situation could arise. As correctly observed by the COA, the existence of a risk that a less favourable situation might arise is sufficient to establish a less favourable situation that had indeed occurred as succinctly explained by the COA in its judgment. We find no reason to depart from the said finding and reasoning on this issue. As explained by the COA, with which we agree:

> [35] ... the existence of a risk that a less favourable situation might arise and the mere possibility that it can arise, which is an acknowledgment inherent in s. 3(2) as amended, suffices in establishing that a less favourable situation has indeed, already come about. As such, the appellant and the pensioners she represents, or for that matter any pensioner who may be affected by the impugned amendments, may seek the reliefs sought.
>
> [36] The risk of a less favourable situation arising never existed prior to the amendments brought about by the 2013 Amendment Act. That such a risk now exists with the amendments, when it never did before is, in our view, in itself a less favourable situation." A similar rationale was expressed by the Supreme Court of India in *Chintaman Rao v. The State of Madhya Pradesh* [1950] SCR 594 at p. 765, where Mahajan J stated:
>
> > The law even to the extent that it could be said to authorize the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void.
>
> [37] Should the risk materialise, and a less favourable situation actually presents, with actual loss suffered by pensioners, there is no certainty that the situation presented will be remedied under the amended s. 3(2). The less favourable situation may persist and may never be remedied. Such, would not have existed under the PAA 1980, prior to the amendments.

[45] As correctly observed by the COA, under art. 147 of the Federal Constitution, there is no requirement that any pensioner must first suffer actual loss or damage before the less favourable law may be held to contravene art. 147. It only requires that the 'later law' must not be 'less favourable'. The existence of a risk that a less favourable situation might arise and the mere possibility that it can arise, which is an acknowledgment inherent in s. 3(2) as amended, suffices in establishing that a less favourable situation has indeed, already come about. It is irrelevant whether there is actual implementation of the amendment that puts the pensioner at a disadvantage.

[46] For the above said reasons, we are of the considered view that the amendments to s. 3 and 6 of the PAA 1980 brought about by ss. 3 and 7 of the 2013 Amendment Act had resulted in a less favourable situation to the respondents and thus contravene art. 147 of the Federal Constitution. Therefore, our answer to question 1 is in the affirmative. We find there is no necessity to answer question 2.

[47] Questions 3(a) posed by the appellants relate to an issue whether the pre-amendment law is revived by itself with the striking down of the impugned provision by the court, and question 3(b) is whether the schedule to the pre-amended law which had been deleted by Parliament with the coming into effect of the impugned provision is likewise revived automatically. These questions were posed presumably as the result of the COA order in restoring the *status quo* prior to the amendment:

> [48] In substance these declarations are not inconsistent with the actual declarations sought. With these declarations, the situation prevailing before the amendment to s. 3 of PAA 1980 will be revived and continue to apply.

[48] However, before us, the learned Senior Federal Counsel did not make any submission on these questions 3(a) and 3(b). Be that as it may, it is our considered view that the COA is correct in restoring the *status quo*. This is because when a court strike down a statute or an amendment to a statute, the pre-existing provision is automatically revived. This is unlike legislative repeal: as the consequence of which is provided under s. 73 of the Interpretation Acts 1967. The same position was adopted by the Indian Supreme Court in The Supreme Court Advocate on *Record v. Union of India* (2016) 5 SCC 1 p. 472:

> 414. When a legislature amends or repeal an existing provision, its action is of its own free will and is premised on well-founded principles of interpretation including provisions of General Clause Act. Not when an amendment/repeal is set aside through a judicial process. It is not necessary to repeat the consideration recorded in para 412.9 above. When a judgment sets aside an amendment or a repeal by legislature, it is but natural that the status quo ante, would stand restored.

[49] Hence, our answers to questions 3(a) and 3(b) are in the affirmative.

Conclusion

[50] For the above said reasons, it is our unanimous decision that there is no merit in the appellants' appeal. The appeal is dismissed. The decision and order of the COA is affirmed. Since this is a public interest case, we make no order as to cost.